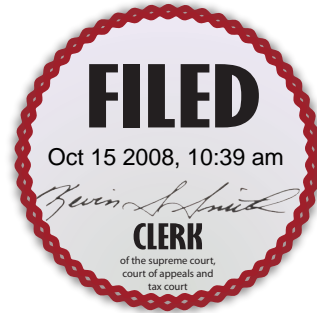


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LAURIE OVERTON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 41A04-0802-CR-72
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable K. Mark Loyd, Judge
Cause No. 41C01-0610-FC-40

October 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following Appellant-Defendant Laurie Overton's guilty plea to and conviction for Theft as a Class C felony,¹ the trial court imposed an enhanced sentence of six years, with four years executed and two years suspended to probation, and ordered that Overton pay restitution to Johnson Heating & Cooling in the amount of \$177,000. On appeal, Overton challenges both her sentence and the restitution order. We affirm in part and remand to the trial court with instructions.

FACTS AND PROCEDURAL HISTORY

For a period of sixteen years, Overton worked as the office manager/bookkeeper at Johnson Heating & Cooling. Beginning in approximately 2000, Overton stole company funds and used them for her personal benefit. Overton continued to steal from Johnson Heating & Cooling until approximately June 2005, when a representative of Johnson Heating & Cooling discovered that Overton had charged approximately \$18,000 to a Johnson Heating & Cooling credit card. A subsequent investigation by the Internal Revenue Service revealed that Overton had stolen approximately \$214,000 from Johnson Heating & Cooling.

On October 26, 2006, the State charged Overton with seven counts of Class C felony forgery, one count of Class C felony corrupt business influence, seven counts of Class D felony theft, and one count of Class C felony theft. On November 8, 2007, Overton pled guilty to one count of theft as a Class C felony. In exchange for Overton's guilty plea, the State agreed to merge all of the remaining counts into the Class C felony theft charge.

¹ Ind. Code § 35-43-4-2 (2001).

Overton's plea agreement stated that she would pay \$77,000 of restitution plus any additional amount imposed by the trial court. Overton's plea agreement also stated that sentencing would be left to the discretion of the trial court.

On January 11, 2008, the trial court sentenced Overton to six years, with four years executed and two years suspended to probation. The trial court also ordered Overton to pay an additional \$100,000 in restitution, for a total of \$177,000. This appeal follows.

DISCUSSION AND DECISION

Sentence

On appeal, Overton challenges her six-year sentence for theft as a Class C felony on the ground that the trial court abused its discretion in weighing the aggravating and mitigating factors presented at the sentencing hearing and on the additional ground that her sentence is inappropriate in light of the nature of her offense and her character. Initially, we note that although on first glance it appears that Overton waived her right to appellate review of her sentence as a term of her plea agreement, both parties have stipulated that such waiver was not intended to be included in Overton's plea agreement. Therefore, Overton has not waived her right to appellate review of her sentence.

I. Aggravating and Mitigating Circumstances

Initially, we note that, effective April 25, 2005, Indiana's sentencing scheme was amended in response to *Blakely v. Washington*, 542 U.S. 296 (2004). Under Indiana's pre-*Blakely* sentencing scheme, a defendant's sentence was derived from a presumptive sentence which could be enhanced or reduced following the weighing of various aggravating or

mitigating factors by the trier of fact. Here, Overton's theft began in January 2002 and ended in June 2005. Because Overton's theft occurred almost entirely before the General Assembly implemented the new post-*Blakely* sentencing scheme, the sentencing scheme in place pre-*Blakely* is applicable to the instant matter. *Thompson v. State*, 875 N.E.2d 403, 405 (Ind. Ct. App. 2007), *trans. denied*.

Overton challenges her six-year sentence, claiming that the trial court abused its discretion in weighing the aggravating and mitigating circumstances argued by the parties at the sentencing hearing. It is well-established that sentencing decisions lie within the discretion of the trial court. *Diaz v. State*, 839 N.E.2d 1277, 1279 (Ind. Ct. App. 2005). The trial court has discretion to determine whether a presumptive sentence will be increased or decreased because of aggravating or mitigating circumstances. *Klein v. State*, 698 N.E.2d 296, 300 (Ind. 1998). On appeal, we afford great deference to a trial court's sentencing decision and will only reverse for an abuse of discretion. *Diaz*, 839 N.E.2d at 1279.

When a court engages in a balancing process between aggravating and mitigating circumstances, it is obligated to include a statement of its reasons for selecting the imposed sentence. *Id.* A trial court is not obligated to accord the same weight to a factor which the defendant considers mitigating or to find mitigators simply because they are urged by the defendant. *Id.* Only one valid aggravator is needed to sustain an enhanced sentence. *Reaves v. State*, 586 N.E.2d 847, 852 (Ind. 2002).

A. Mitigating Circumstances

On appeal, Overton claims that the trial court failed to accord proper weight to certain

mitigating circumstances, specifically her lack of a prior criminal record, her remorse, the undue hardship on her family if she were to serve an executed sentence, her agreement to pay restitution, her guilty plea, and that she would respond affirmatively to probation or short-term imprisonment.

The finding of mitigating factors is not mandatory and rests within the discretion of the trial court. The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Nor is the court required to give the same weight to proffered mitigating factors as the defendant does. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. However the trial court may not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them.

Espinoza v. State, 859 N.E.2d 375, 387 (Ind. Ct. App. 2006) (citations and quotation marks omitted).

Here, Overton argued four mitigating circumstances at trial: (1) lack of a prior criminal record, (2) remorse, (3) undue hardship on her family, and (4) agreement to pay restitution. Concerning her lack of a prior criminal record, Overton questions whether she received proper mitigating weight in light of the trial court's determination that the ongoing nature of her actions was an aggravating circumstance. Although the lack of a prior criminal record is a significant mitigating circumstance, the trial court determines the weight assigned to mitigating circumstances. *McElroy v. State*, 865 N.E.2d 584, 592 (Ind. 2007). The lack of a prior criminal record does not automatically outweigh any valid aggravating circumstance, rather, it is a balancing test. *Id.* Here, the trial court found Overton's lack of a prior criminal record to be a mitigating circumstance and accorded it mitigating weight. Tr. p. 64. Because

it is within the trial court's discretion to determine the weight afforded to all mitigating and aggravating circumstances, we will not disturb the mitigating weight afforded by the trial court to Overton's lack of a prior criminal record. *See id.*

With respect to Overton's alleged remorse, the trial court, which has the ability to directly observe the defendant and listen to the tenor of her voice, is in the best position to determine whether the remorse is genuine. *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). At the sentencing hearing, the trial court, finding that Overton's alleged remorse did not warrant mitigating weight, noted Overton's demeanor and behavior, explaining that "I can't say that I'm overwhelmed by way of your letter and comments today with your remorse for the consequences of your actions." Tr. p. 65. Because the trial court was in the best position to directly observe Overton to determine whether her alleged remorse was genuine, we will not disturb the trial court's determination that this was not a significant mitigating factor. *See Corralez*, 815 N.E.2d at 125.

Overton also asserts that the trial court did not accord sufficient weight to the undue hardship her incarceration would inflict upon her dependents. Hardship to a defendant's dependents is not always a significant mitigating circumstance. *McElroy*, 865 N.E.2d at 592. The trial court found that Overton's incarceration would impact her family, but that any hardship incurred by Overton's family could be balanced against the hardship that Overton's theft placed upon Johnson Heating & Cooling and its employees. Tr. pp. 67-69. The trial court determined that because the hardship to Overton's family was balanced by the hardship incurred by Johnson Heating & Cooling and its employees, this hardship did not amount to a

mitigating circumstance. Tr. pp. 67-69. The trial court was not obligated to accept Overton's assertion that the undue hardship incurred by her family warranted mitigating weight, and therefore we will not disturb the trial court's determination that this was not a significant mitigating factor. *See Espinoza*, 859 N.E.2d at 387.

With respect to restitution, Overton asserts that the trial court failed to accord mitigating weight to her agreement to pay restitution to Johnson Heating & Cooling. The trial court determined that Overton's agreement to pay restitution did not warrant mitigating weight because of the unlikelihood that Overton would be capable of paying the full restitution order. Tr. pp. 69-70. Because a finding of mitigating circumstances is within the discretion of the trial court, the trial court was not compelled to grant Overton's promise to pay restitution to be a mitigating circumstance. *See Moritz v. State*, 465 N.E.2d 748, 759 (Ind. Ct. App. 1984), *trans. denied*.

Overton also asserts that the trial court failed to find the fact that she entered into a plea agreement to be a mitigating circumstance. "[A]lthough we have long held that a defendant who pleads guilty deserves 'some' mitigating weight to be given to the plea in return, a guilty plea may not be significantly mitigating when the defendant receives a substantial benefit in return or when the defendant does not show acceptance of responsibility." *McElroy*, 865 N.E.2d at 591 (citations omitted). Here, in exchange for Overton's plea, the State agreed to dismiss fifteen additional felony charges. Additionally, Overton's testimony at the sentencing hearing indicates that she has yet to accept full responsibility for her actions. Tr. p. 67. Therefore, we will not disturb the trial court's

determination that this was not a significant mitigating factor.

Finally, Overton asserts that the trial court failed to accord mitigating weight to the fact that Overton would respond affirmatively to probation. Overton, however, failed to raise this proposed mitigator before the trial court. ““A defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal.”” *Johnson v. State*, 837 N.E.2d 209, 215 (Ind. Ct. App. 2005) (quoting *Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005), *trans. denied*). Therefore, Overton has waived this claim.

From our review of the record, we are convinced that the trial court considered all evidence of the alleged mitigating circumstances presented by Overton. The trial court made a clear sentencing statement recognizing all argued mitigators, and found Overton’s lack of a prior criminal record to be a mitigating circumstance. Additionally, the trial court appears to have afforded little weight to Overton’s plea agreement in light of the substantial benefit Overton received as a result of her plea. Again, a trial court has discretion to find mitigating circumstances and, absent an abuse of discretion, this court will not remand for resentencing. *See Hardebeck v. State*, 656 N.E.2d 486, 493 (Ind. Ct. App. 1995), *trans. denied*. Overton has not shown an abuse of discretion in this regard.

B. Aggravating Circumstances

Additionally, Overton claims that the trial court improperly found the ongoing nature

of her actions to be an aggravating circumstance.² At sentencing, the trial court found the ongoing nature of Overton's actions and the violation of a position of trust to be aggravating circumstances. The trial court articulated its reasons for finding these factors to be aggravating, stating the following:

I do find aggravating the fact that there were multiple events over several years. You had a number of opportunities to think, reconsider, weigh ebb and flow with regard to your attitude, your families [sic] circumstances. Your demeanor. That you continued to participate in the conduct over a lengthy period of time and participated in multiple thefts and deceptions. You further had an opportunity to stop what you were doing and by not doing so repeatedly violated a trust relationship that you had been placed in. I find both the violation of the trust relationship as well as the length and number of deceptions that occurred, each to be a [sic] aggravating circumstance in your case.

Tr. p. 70.

Specifically, Overton points to the charges that were ultimately merged into her theft conviction pursuant to her plea agreement and argues that the trial court's apparent reliance on these charges in finding the ongoing nature of her actions to be an aggravating circumstance, is improper. In support, Overton cites to *Farmer v. State*, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002), which states that a defendant who is sentenced more harshly based on charges that were dismissed pursuant to a plea agreement does not receive the full benefit of the plea agreement.

Overton pled guilty to one count of theft as a Class C felony. The charging information for this count alleged the following:

² Overton does not challenge the trial court's finding that her violation of her position of trust at Johnson Heating & Cooling was an aggravating circumstance.

On or about January 2002 through June 2005, in Johnson County, Indiana, Laurie M. Overton knowingly or intentionally exerted unauthorized control over the property, to-wit: at least \$100,000 in *U.S. currency* belonging to Johnson Heating & Cooling, Inc. with the intent to deprive Johnson Heating & Cooling, Inc. of any part of the use or value of such property.

Appellant's App. p. 112 (emphasis in original). We observe that the charging information for the Class C felony theft charge to which Overton pled guilty alleged that her ongoing criminal act of theft took place between January 2002 and June 2005, or over a period of more than three years. We further observe that the testimony before the trial court establishes that Overton engaged in ongoing conduct that enabled her to steal over \$100,000 from Johnson Heating & Cooling. Therefore, we conclude that the trial court's consideration of Overton's "multiple thefts and deceptions" was a valid evaluation of the ongoing nature of her theft conviction rather than an impermissible consideration of the other alleged charges subsequently dismissed pursuant to her plea agreement.

This court has previously held that evidence of ongoing criminal conduct may be considered to be an aggravating circumstance at sentencing. *See Jack v. State*, 870 N.E.2d 444, 448 (Ind. Ct. App. 2007) (finding defendant's involvement in an ongoing criminal enterprise to be a significant aggravating circumstance), *trans. denied*. Because the evidence establishes that Overton engaged in ongoing criminal conduct over a period of more than three years in furtherance of her ongoing theft from Johnson Heating & Cooling which resulted in her conviction for Class C felony theft, we affirm the trial court in this regard.

Finally, to the extent that Overton claims that the trial court improperly relied upon the concept of "general deterrence" as an aggravating circumstance in determining the length of

her sentence, the record demonstrates that the concept of “general deterrence” did not serve as an aggravator in this case. The trial court specifically stated that it did not consider this factor to be an aggravator or a mitigator. It appears that the trial court’s allusions to the concept of deterrence were merely observations of its use as a guide by courts and the legislature when creating and enforcing laws. Because Overton failed to show that the trial court’s statements pertaining to deterrence had any aggravating effect on her sentence, we conclude her challenge on this ground has no merit.

In weighing the mitigating and aggravating circumstances, the trial court stated:

Not only with regard to the number but also the severity and the weight of the aggravating circumstances that I find in this particular case. You should, you deserve and the vast weight of the evidence supports an aggravating [sic] sentence.... I do not believe today, that based upon you [sic] lack of a criminal history that it is even in the ball park of a maximum sentence that the Court should give.... Your circumstance doesn’t justify a maximum sentence and I shall not give it. However, it does justify an aggravated sentence.

Tr. pp. 71-72. Having concluded that the trial court did not abuse its discretion in either weighing the mitigating circumstances alleged by Overton or determining that the ongoing nature of Overton’s theft was a proper aggravating circumstance, we conclude that the trial court did not abuse its discretion in sentencing Overton to an enhanced six-year sentence.

II. Appropriateness

Overton also challenges her six-year sentence, claiming that it is inappropriate in light of the nature of her offense and her character. Indiana Appellate Rule 7(B) provides that “[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature

of the offense and the character of the offender.”

Although appellate review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied. The defendant has the burden of persuading us that his or her sentence is inappropriate.

Fonner v. State, 876 N.E.2d 340, 343 (Ind. Ct. App. 2007) (citations and quotation marks omitted).

Overton claims that her sentence is inappropriate in light of her good character. In support, Overton asserts that she has been married for twenty-five years and has raised two children. She also asserts that she cares for her mother and her grandchildren. Overton additionally asserts that, with the exception of her acts associated with the instant matter, she has led a law abiding life. The record, however, paints a different portrait of Overton’s character. Overton pled guilty to stealing over \$100,000 from an employer whom she considered to be family. Her behavior at the sentencing hearing was such that the trial court gave the following admonishment:

Ms. Overton, I can tell you this, alright. You know, even if what this witness is indicating to me is completely wrong. I will ultimately make the facts, the factual determination on that. But I can tell you, your dances of disenchantment, alright. The shaking of your head. The rolling of your eyes et cetera, does you absolutely no good in these proceedings. Because you have no basis whatsoever to even remotely criticize anybody else in this courtroom today and most certainly you don’t have any reason whatsoever to criticize what you have done to this man, based upon your own admission. So with all do [sic] respect contemplate where you are at and what’s going on here because, even if he is making a misstatement, mis-perceiving something or other wise, you are not the person with all due respect to be righteously indigent [sic] about it.

Tr. pp. 46-47. Additionally, Overton's demeanor and statements showed a lack of remorse for her actions. While we commend Overton for her commitment to caring for her family, we are unpersuaded that in light of the other evidence relating to her character and her theft of over \$100,000 from an employer whom she admittedly considered to be family, Overton's six-year sentence is inappropriate.

Overton also claims that her sentence is inappropriate in light of the nature of her offense. Overton asserts that she lives a very simple life and that her actions were born of her family's financial difficulties. We again are unpersuaded that Overton's sentence is inappropriate. The evidence established that while Overton's theft may have alleviated her own financial difficulties, it created financial difficulties for not only Johnson Heating & Cooling, but also for its employees and their families. Additionally, as a result of Overton's actions, Johnson Heating & Cooling did not complete necessary maintenance on company equipment, and could no longer grant raises and bonuses to its employees. Overton's financial difficulties in no way justify her actions of stealing well over \$100,000 from her employer for her own personal use.

Having concluded that the trial court did not abuse its discretion in determining or weighing the aggravating and mitigating factors, and that Overton's sentence is appropriate in light of her character and the nature of her offense, we affirm Overton's six-year sentence.

Restitution Order

Overton challenges the trial court's restitution order by claiming that the trial court abused its discretion in failing to determine her ability to pay the restitution ordered in

excess of the \$77,000 amount agreed to by the parties as a condition of Overton's plea agreement.

The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused. Restitution also serves to compensate the offender's victim. And, when the trial court enters an order of restitution as part of a condition of probation, the court is required to inquire into the defendant's ability to pay. This is so in order to prevent indigent defendants from being imprisoned because of a probation violation based on a defendant's failure to pay restitution.

Pearson v. State, 883 N.E.2d 770, 772 (Ind. 2008). A trial court may also order restitution as a part of a defendant's sentence wholly apart from probation. *Id.* at 773. When restitution is ordered as part of an executed sentence, an inquiry into the defendant's ability to pay is not required. *Id.* In such a situation, restitution is merely a money judgment and a defendant cannot be imprisoned for non-payment. *Id.* The issue of whether a trial court has exceeded its authority in ordering restitution may be raised for the first time on appeal. *Laker v. State*, 869 N.E.2d 1216, 1220 (Ind. Ct. App. 2007).

The trial court's sentencing order specifically states that "Said victims are hereby granted JUDGMENTS against Defendant for \$177,000.00, which shall be paid as follows: entered as a JUDGMENT against Defendant" and also that "the Defendant ... shall abide by the following Special Rules and Conditions of Probation: ... Defendant to make regular monthly payments towards restitution when released to probation." Appellant's App. p. 124. In some cases, restitution is characterized as either a judgment or a condition of probation. Here, however, the clear language of the trial court's sentencing order establishes that the trial court clearly intended that the restitution order serve in both capacities. Therefore, we

cannot conclude that the restitution order was made wholly apart from Overton's probation obligation.

Because the trial court ordered that Overton pay restitution as a condition of her probation, the trial court was required to conduct a hearing to determine Overton's ability to pay and "fix the amount, which may not exceed an amount the person can or will be able to pay." Indiana Code § 35-38-2-2.3(a)(5) (2007). Here, while the trial court did note the unlikelihood that Overton would be capable of paying the full restitution order, it made no specific finding regarding Overton's ability to pay the restitution order. We therefore remand this matter to the trial court for a hearing to determine Overton's ability to pay the restitution ordered by the trial court in excess of the \$77,000 agreed to by the parties as a condition of Overton's guilty plea. Furthermore, as Chief Judge Baker previously noted in his concurrence in *Shepard v. State*, 839 N.E.2d 1268, 1271 (Ind. Ct. App. 2005) (Baker, J., concurring), because it is impossible to predict the future, the trial court may wait to conduct a hearing to determine Overton's ability to pay the restitution until the commencement of Overton's probation when her obligation to pay restitution begins.

Having determined that the trial court did not abuse its discretion in its determination relating to the aggravating and mitigating circumstances alleged by the parties, that Overton's sentence was appropriate, and that the trial court ordered that Overton pay restitution as a condition of her probation, with respect to Overton's sentence, we affirm the judgment of the trial. With respect to the restitution order, we remand to the trial court for a hearing to determine Overton's ability to pay.

The judgment of the trial court is affirmed in part and remanded to the trial court with instructions.

RILEY, J., and BAILEY, J., concur.